

## **FIFTH AMENDMENT TAKINGS**

### **I. CONSTITUTIONAL PROVISIONS**

#### **A. FEDERAL CONSTITUTION**

1. Fifth Amendment to the Constitution provides in part “No person shall. . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation.”
2. Fourteenth Amendment to the Constitution provides in part “No state shall make or enforce any law which shall. . . deprive any person of . . . property, without due process of law. . . .”

The purpose behind the Fifth Amendment’s takings clause is to prevent the government from “forcing some people alone to bear public burdens which, in all fairness and justice, shall be borne by the public as a whole.” Armstrong v. United States, 364 U.S. 40, 49 (1960). The United States Supreme Court has held that the Fifth Amendment is made applicable to the states by virtue of the Fourteenth Amendment.

#### **B. NEBRASKA CONSTITUTION**

1. Article I, §3 of the Nebraska Constitution provides in part “No person shall be deprived of . . . property without due process of law.”
2. Article I, §21 of the Nebraska Constitution provides in part “the property of no person shall be taken or damaged for public use without just compensation therefor.”

### **II. PRIVATE PROPERTY TAKINGS**

The takings clause of the Fifth Amendment, applicable to the states through the Fourteenth Amendment, prohibits the government from taking private property for a public use without just compensation. Property includes the right to exclusive possession of the property, right to use the property, and right to dispose of the property. Taking of private property may occur in two manners.

#### **A. PHYSICAL TAKINGS**

A physical taking occurs when the government encroaches upon or occupies private land for its own proposed use. Even a minimal permanent physical occupation of real property requires compensation under the takings clause of the Fifth Amendment.

## **B. REGULATORY TAKINGS**

The right to improve property is subject to the reasonable exercise of state authority, including the enforcement of valid zoning and land use restrictions. Village of Euclid v. Amber Realty Co., 272 U.S. 365, 574 S.Ct. 114 (1926). As stated in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922): “Government hardly could go on if to some extent values instant to property could not be diminished without paying for every such change in the general law.” However, the Supreme Court recognized that there will be instances when government actions although not encroaching upon or occupying property still affects and limits its use to such an extent that a taking occurs. The rule is that “While property may be regulated to a certain extent, if a regulation goes too far, it will be recognized as a taking.” Id. at 415.

### **1. CATEGORICAL (FACIAL) REGULATORY TAKINGS**

A two-part disjunctive test is used to determine whether the adoption of a regulation effects a taking on its face. A taking results if either test is met.

- a. Does the regulation substantially advance legitimate state interest? or
- b. Does the regulation deny the owner “all economically beneficial or production use of land”? Agins v. City of Tiburon, 447 U.S. 255, 100 S.Ct. 2138 (1980).

**Denial of all economic use – Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 112 S.Ct. 2886**

#### **FACTS:**

In 1986 Lucas bought two of the last four beach front residential lots in an existing development on the Isle of the Palms, a barrier island east of Charleston, South Carolina, for \$975,000. At the time of its purchase, Lucas was not required to obtain any special development permit in advance of constructing a single-family home on the two lots.

Subsequently, in 1988, South Carolina enacted the Beach Front Management Act which classified Lucas’s land as an unstabilized inlet erosion zone. This classification had the direct effect of barring Lucas from erecting any permanent habitable structures on his two lots. No variances or exceptions from the prohibition were authorized in the Act. In adopting the Act, South Carolina’s legislature found that the beach/dune area of South Carolina’s shores is an extremely valuable public resource, that the erection of new construction contributes to the erosion and destruction of this public resource, and that discouraging new construction in close proximity to the beach/dune area is necessary to prevent great public harm (i.e. the risk that severe storms will break up ocean front structures and propel the splintered debris like battering rams into nearby neighborhoods).

At trial, Lucas did not challenge these legislative findings nor argue that the Act was an unlawful exercise of South Carolina's police power. Rather, Lucas argued that the Act's complete extinguishment of his property's value entitled him to compensation regardless of whether South Carolina had acted in furtherance of legitimate police power objectives. The trial court agreed and found that the Act's prohibition on development rendered Lucas's two lots valueless and thus held that Lucas's property had been taken by operation of the Act. The court found that Lucas was entitled to just compensation in the amount of \$1,232,387.50.

The South Carolina Supreme Court reversed the trial court decision holding that the Act was not a taking. In so deciding, the Court ruled that when a regulation respecting the use of property is designed to prevent serious public harm, no compensation is owed under the takings clause regardless of the regulation's effect on the property's value.

On appeal, the United States Supreme Court reversed stating that the South Carolina's legislature's "recitation of a noxious-use justification cannot be the basis for departing from the U.S. Supreme Court's categorical rule that total regulatory takings must be compensated." Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1026, 112 S.Ct. 2886, 2899. Furthermore, in a footnote, the Court noted that since a "noxious-use justification can be formulated in practically every case, this amounts to a test of whether the legislature has a stupid staff. We think the takings clause requires courts to do more than insist upon harm-preventing characterizations." Id. at 1025, 112 S.Ct. at 2898.

The Court was clearly concerned by the fact that regulations that leave the owner of land without economically beneficial or productive options for its use – typically, by requiring land to be left substantially in its natural state – carry with them the heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.

However, in Lucas, the U.S. Supreme Court did not ultimately decide whether or not Lucas was entitled to just compensation. Specifically, the Court found that the case needed to be remanded to the South Carolina Supreme Court for determination of whether or not the ban on development was already a limitation that was inherent in title to the land itself based upon background principles of South Carolina's law of property and nuisance. In other words, the Court stated that a regulation prohibiting a use that was already prohibited under the state's common law principles of property was not a compensable taking. The Court used the following examples to describe such a situation: (1) The owner of a lakebed would not be entitled to compensation when he is denied the requisite permit to engage in a landfilling operation that would have the effect of flooding another person's land; and (2) the corporate owner of a nuclear generating plant would not be entitled to compensation when it is directed to remove all improvements from its land upon discovery that the plant sits astride an earthquake fault. Even if such regulatory actions have the effect of eliminating the land's only economically productive use, the regulations do not prohibit productive use that was previously permissible under relevant property and nuisance principles. Rather, such use of these properties was always unlawful.

## **2. JUSTICE AND FAIRNESS (AD HOC - AS APPLIED) REGULATORY TAKINGS**

**Penn Central Transp. Co. v. New York City, 438 U.S. 104, 98 S.Ct. 2646 (1978).**

Where a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking may or may not have occurred.

The Supreme Court has not eschewed any set formula for determining when justice and fairness require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. The outcome instead depends largely upon the particular circumstances in each case. The Court has identified several factors that have particular significance in these “essentially ad hoc, factual inquiries.” Those factors are:

1. Economic impact of the regulation on the claimant and particularly the extent to which the regulation has interfered with distinct investment backed expectations.

2. The character of the governmental action. The purposes served, as well as the effects produced by a particular regulation inform the takings analysis. A use restriction on real property may constitute a taking if not reasonably necessary to the effectuation of a substantial public purpose or perhaps if it has an unduly harsh impact upon the owner’s use of the property. The courts may properly consider the effect of any existing regulations under the rubric of investment back expectations in determining whether a compensable taking has occurred. However, the fact that a piece of property has changed hands after a regulation came into effect does not always and automatically bar a takings claim. Rather, much depends upon whether, or how, the timing and circumstances of a change of ownership affect whatever reasonable investment back expectations might otherwise exist. Penn Central Transp. Co. v. New York City, 438 U.S. 104, 98 S.Ct. 2646 (1978).

## **3. UNCONSTITUTIONAL CONDITIONS**

**Nollan v. California Coastal Comm’n, 483 U.S. 825, 107 S.Ct. 3141 (1987)**  
**Dolan v. City of Tigard, 512 U.S. 374, 114 S.Ct. 2309 (1994)**

A condition of approval will not result in a judicial determination of an unconstitutional taking if:

- (a) The condition furthers a substantial legitimate governmental interest; and
- (b) The condition is related to the interest it serves; and
- (c) The impacts of the development are roughly proportional to the condition imposed.

**FACTS for Dolan v. City of Tigard**

Florence Dolan was the owner of a plumbing and electric supply store located on Main Street in the central business district of the city. The store covered approximately 9,700 square feet on the eastern side of a 1.67 acre parcel which included a gravel parking lot. Fanno Creek flowed through the southwest corner of the lot and along its western boundary. The City of Tigard had adopted a master drainage plan to address flooding which occurred in several areas along Fanno Creek, including areas near Dolan's property. The drainage plan established that the increase in the impervious surfaces associated with continued urbanization exacerbated the flooding problems along Fanno Creek. To combat these risks, the drainage plan suggested a series of improvements to the Fanno Creek Basin, including channel excavations in the area next to Dolan's property. Other recommendations in the drainage plan included insuring that the flood plain remain free of structures and that it be preserved as greenways to minimize flood damage to structures. Subsequently, Ms. Dolan applied to the City of Tigard for a permit to redevelop her site. The proposed plans called for nearly doubling the size of the store from 9,700 square feet to 17,600 square feet and paving a 39-space parking lot. The city planning commission granted the application subject to conditions imposed by the city's community development code. The code provided that where landfill and/or development is allowed within and adjacent to the 100-year flood plain, the city shall require the dedication of sufficient open land areas for greenway adjoining and within the flood plain. This area shall include portions at a suitable elevation for the construction of a pedestrian/bicycle pathway within the flood plain in accordance with an adopted pedestrian/bicycle plan. Pursuant to these regulations, the planning commission required Ms. Dolan to dedicate a portion of her property lying within the 100-year flood plain for improvement of a storm drainage system along Fanno Creek. The two dedications encompassed approximately 7,000 square feet or roughly 10% of her property. However, Ms. Dolan was allowed to use the dedicated property to meet the 15% open space and landscape requirements mandated by the city's zoning ordinance. In requiring the flood plain dedication, the commission found that it was reasonably related to Ms. Dolan's request to intensify the use of her site given the increase in the impervious surface, and that the anticipated increased storm water flow from the subject property could only add to the public need to manage the stream channel and flood plain along Fanno Creek for drainage purposes. Ms. Dolan appealed on the grounds that the flood plain and bikepath dedications were not related to her proposed development and therefore the required dedications constituted an uncompensated taking of her property under the Fifth Amendment. In evaluating Ms. Dolan's claim, the U.S. Supreme Court found that it must first determine whether an essential nexus exists between a "legitimate state interest" and the permit conditions exacted by the City of Tigard. The Court further found that if an essential nexus exists, the Court must then decide whether the required dedication was roughly proportional in both nature and extent to the impact of Ms. Dolan's proposed development. The Court had no difficulty finding that the prevention of flooding along Fanno Creek and the reduction of traffic congestion in the central business district qualified as the type of legitimate public purpose the Court had previously upheld. It was equally obvious to the Court that a nexus exists between preventing flooding along Fanno Creek and limiting development within the creek's 100-year flood plain. However, the Court found that the city had demanded too much. It not only wanted Ms. Dolan to not build in the flood plain but also wanted Dolan's property along Fanno Creek for its greenway system. Although the Court held that no precise mathematical calculation is required, the City of Tigard was required to make some sort of individualized determination that the required dedication is related both in nature

and extent to the impact of the proposed development. This the City failed to do as it never explained why a public greenway as opposed to a private one was required in the interest of flood control. To the Court the difference between public and private ownership was Dolan's loss of ability to exclude others – one of the most essential sticks in the bundle of rights that are commonly characterized as property. The Court found that it is difficult to see why recreational visitors trampling along petitioner's flood plain easement are sufficiently related to the city's legitimate interest in reducing flooding problems along Fanno Creek. The Court found that the city's goals of reducing flooding hazards and traffic congestion and providing for public greenways are laudable but there are outer limits to how this may be done. As the Court stated, a strong public desire to improve the public condition will not warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. The U.S. Supreme Court then remanded the case back to the City of Tigard to review its original exactions in light of the new Dolan test. In the meantime, the Dolan family had filed a civil action in the Washington County Circuit Court seeking monetary damages in the amount of \$2,463,428. Their claims were based on temporary taking, permanent taking, inverse condemnation, and damages under 42 U.S.C. §1983. After the suit was filed, the city once again conditionally approved Ms. Dolan's application under a slightly revised but similar condition of approval which it sought to justify under Dolan. The new condition required dedication by easement of property within the 100-year flood plain for flood and erosion control and drainage purposes and dedication by easement of a 15-foot area above the flood plain boundary for a bike/pedestrian path. The trial of the circuit court lawsuit began in November 1997 and after two weeks of trial and before the case went to the jury, the City of Tigard settled the suit for a payment of \$1.5 million, dedication of the flood plain and path area to the city, issuance of land use and building permits, and placement by the City of Tigard along the bike/pedestrian path site of a permanent plaque commemorating the legal action taken by the Dolans resulting in the U.S. Supreme Court decision.